No. ~~15829~~ 16255

United States
COURT OF APPEALS
for the Ninth Circuit

CARL E. THORSON,

Appellant,

vs.

INLAND NAVIGATION COMPANY,
a Corporation,

Appellee,

vs.

ARCHER-DANIELS-MIDLAND CO.,

Third Party Appellee.

IN ADMIRALTY

PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-59

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TO THE HONORABLE WILLIAM E. ORR and WALTER L. POPE, Circuit Judges, and LEON R. YANKWICH, District Judge, Constituting the Court in the original hearing herein:

Appellee, Inland Navigation Company, respectfully submits that this court has substantially erred and in so doing has further extended the doctrine of unseaworthiness beyond all reasonable bounds and expectations.

THE COURT ERRED IN CONCLUDING THAT IF THE TRIAL COURT SHOULD INFER THAT THE HANGING LINES PRESENTED A POSSIBILITY OF FOULING WITH THE FLAG THE CONCLUSION OF UNSEAWORTHINESS WOULD BE UNAVOIDABLE.

This Court's finding that the trial Court could infer unseaworthiness because of the closely hanging lines went beyond all of the pleadings and contentions raised in this case.

Article IV of the original libel alleged:

> "That on said day said vessel was unseaworthy in that said signal flag was not properly secured to the vessel but was loose in its socket and positioned where it was wont to fall into the hold of the said vessel."

It is important to note that there was absolutely no allegation that any close proximity of lines hanging in the vicinity of the flag caused it to become unseaworthy. *The Appellant's sole contention was that the flag itself was unseaworthy because it was not properly secured.*

The case was tried on a pre-trial order and the libelant contended.

> "Libelant contends that the libelant was injured by reason of the unseaworthiness of Inland Navigation Company's barge in that the signal flag was not properly secured to the vessel but was loose in its socket and positioned where it was wont to fall into the hold of the vessel."

Based on the issues on which the case was tried, the trial Court held that the baker flag was recognized gear

and equipment and that it was physically impossible for the baker flag to become disengaged from its standard socket through its own action. The trial Court further held that it would have to be manually withdrawn or "some line would have to become fouled with the flag which caused it to be yanked from its socket."

The trial Court further found that the lines and gear of the stevedore hung freely in the area of the baker flag and these lines and gear were not part of the barge's gear.

The sole issue urged on the appeal by Mr. Thorson:

> "Was the barge No. 501 unseaworthy *in that the baker flag was not properly secured to the vessel but was loose in its socket and positioned where it was wont to fall into the hold of said vessel.*"

This Court in effect went beyond the issues and the sole contention of the libelant in reversing the case. The trial Court had already found that the flag in and of itself did not render the vessel unseaworthy and the finding "that some line would have to become fouled with the flag which caused it to be yanked from its socket" would be nothing more than an incidental finding and completely outside the scope of the issues raised in the pre-trial order and as Judge Yankwich stated at the time of the oral argument, this finding was unnecessary and that it was merely incidental and nothing more.

In *Peterson v. Alaska Steamship Company* (CCA 9th 1953), 205 F. (2d) 478, the injuries were apparently caused by a breaking block brought on board by the

stevedoring company. The block was brought on board the vessel whereas in this case there is absolutely no evidence that the hanging lines were even on the vessel. Also in the Peterson case the block actually broke and there the Court stated that it was a logical inference that it would not have broken unless it was defective. The defectiveness rendered the block and also the vessel unseaworthy and the block became a part of the equipment of the vessel in the unloading.

One can think of a great number of cases where some activity could, under the Court's present ruling, render every vessel unseaworthy for something that may have been going on in the vicinity of the ship. For instance if a ship was being loaded by a shoreside crane and the boom of the crane extended over the deck of the vessel and the boom struck some part of the vessel and caused some part of the vessel to fall down on a longshoreman he would be able to recover for unseaworthiness. Another instance would be where lines or ropes connected to a shoreside installation would be hanging above the deck of the vessel and these hanging lines would become fouled with some part of the rigging of the vessel and cause the rigging to collapse and fall on a longshoreman working on the deck of the vessel.

In both instances there was nothing defective or faulty about any of the equipment on the vessel itself and it only became involved because of the actions of the lines connected to the shore or the actions of the crane on the shore.

It was always thought that the appliance giving

rise to liability for unseaworthiness must be incorporated in the ship's gear or equipment. Such is not the case in the two illustrations given and certainly is not in the case presently before the Court. The trial Court merely held that there were hanging lines and gear of the stevedore in the area of the baker flag and further held that these lines and gear were not part of the barge's gear and therefore one could just as well infer that they were gear and lines on shore and certainly they did not become incorporated in the ship's gear and equipment and not incorporated in the baker flag. The Court in its opinion states:

> "In one respect this case presents a stronger one for charging the owners with unseaworthiness than was present in the Peterson case, supra, for here the unseaworthiness, if it existed, was the result of a combination of the owner's loosely placed flag with the near hanging lines attached to the boom. The flag portion of the hazard belonged to the owner, the unseaworthiness arose as much from leaving the flag in the socket near the ropes as from allowing the ropes to hang there."

This Court goes beyond the findings as the trial Judge held that even though the flag was loose in its socket that was the way it was supposed to be and that this in itself did not constitute unseaworthiness. In fact it was the looseness of the flag in the socket that the libelant charged rendered the barge unseaworthy and yet the trial Court held that that was not the case and that the looseness of the flag in the socket was proper and that the vessel was not unseaworthy.

The Court also referred to the near hanging lines "attached to the boom". There is no finding of fact to that effect.

Another illustration is a vessel navigating in a river which comes in collision with a bridge. Assume that the vessel had been navigated in accordance with proper procedures and that the fault was as a result of the negligence and inattentiveness of the operator of the drawbridge. If the mast or other rigging of the vessel had come in contact with the bridge and the rigging or mast had fallen onto the deck of the vessel and struck a seaman, could it be claimed that the seaman sustained his injuries because of the unseaworthiness of the vessel? This is a logical extension of the Court's holding in this case.

In *Crumady v. J. H. Fisser,* 358 U.S. 423, 1959 AMC 580, the topping lift on the vessel itself broke. The trial Court found that the cause of the accident to be the stevedore's improper placing of abnormal strains on the ship's gear. Again it is to be noted that the actual defect in appliance or equipment was the ship's equipment. It was stated that unseaworthiness extends not only to the vessel but to the crew *"and to appliances that are appurtenant to the ship." Mahnich v. Southern SS Co.,* 321 U.S. 96, 1944 AMC 1. As to appliances the duty of the shipowner does not end with supplying them; he must keep them in order.

In *Grillea v. U. S.,* 1956 AMC 009, 232 F. (2d) 919, it was held that the stevedores themselves could render a ship pro tanto unseaworthy and make the vessel owner liable for injuries to one of them.

In all the cases cited the acts of the stevedore made and actual appurtenance of the ship itself unseaworthy.

In none of the cases has the Court held that an appurtenance or appliance of the vessel which is seaworthy or has been found to be seaworthy merely became unseaworthy because of some outside force not actually exerted on it. The baker flag was found to be seaworthy in all regards. This Court has held that it could be inferred from the swinging lines nearby that the baker flag became unseaworthy. How could something become unseaworthy where it was performing its proper function in all regards and was in no way defective?

The Court cites *Grillea v. U. S.*, 232 F. (2d) 919, and in that case a longshoreman was hurt when he stepped on a hatch cover which he and a companion had wrongfully placed over a pad-eye.

The Second Circuit noted in discussing unseaworthiness noted:

> "It would be futile to try to draw any line between situations in which the defect is only an incident in a continuous operation, and those in which some intermediate step is to be taken as making the ship unseaworthy. Nevertheless, it is necessary to separate the two situations, even though each case must turn on its own particular circumstances. In the case at bar although the libelant and his companion * * * had been those who laid the wrong hatch cover of the pad-eye a short time before he fell, we think that enough time had elapsed to result in unseaworthiness. The cover was one of two or three that they had already put in place on the after section of the hatch; it had become a part of the platform across which the two walked to gain access to the middle section on which they were going to place another cover. The misplaced cover had therefore become as much a part of the tween deck for continued prosecution

> of the work, as though it had been permanently fixed in place."

It is to be noted that the hatch cover was itself a part of the ship's equipment as was the pad-eye and the two combined to make the unseaworthy condition. The court noted:

> "It is indeed true that to constitute unseaworthiness the defect must be in the ship's hull, gear or stowage, and even as to those she need not be perfect, but only reasonably fit for service. However, it is at times hard to say whether a defect in hull or gear that arises as a momentary step or phase in the progress of work on board should be considered as an incident in a continuous course of operation, which will fasten liability upon the owner only in case it is negligent, or as an unfitness of the ship that makes her pro tanto unseaworthy. The respondents plausibly argued, for instance, that when a strongback is dislodged by the negligence of a winchman, or of those who direct him, or when someone of the crew carelessly turns the lever that drops a boat from its davits, there is a moment however short, during which the ship is unfit and during which her unfitness causing the injury; yet on such occasion she is not deemed unseaworthy."

As the trial court held that the baker flag was not unseaworthy and that the lines and tackle did not constitute the barge's gear, it would appear that the holding of this Court is clearly erroneous under the Grillea case.

In *Rodgers v. United States Line,* 205 F. (2d) 57, 347 U.S. 984, the stevedore was using one of the ship's booms, the stevedore's landfall, the two ship's winches, a ship's run on one of the winches and the landfall runner furnished by Lavino Company. Ore was shoveled

into tubs which were then hoisted up and off the ship into roller cars on the dock and one of the tubs unexpectedly swung across the hold and struck a longshoreman. The Court noted:

> "It seems now accepted by everyone concerned that the accident was caused by the landfall runner, operated at the time by a Lavino employee rewinding on the winchdrum which forced the tub to move as it did."

The District Court denied the stevedore's motion for a new trial and this was affirmed by the Court of Appeals but the Supreme Court reversed on the basis of the Peterson case.

The longshoreman had claimed that although the runner "was originally provided by the stevedoring contractor, it was adopted by the vessel and incorporated with the vessel's loading equipment and thus became an appurtenance of the vessel with regard to which the ship had a continuing and nondelegable responsibility for its seaworthiness."

The runner became and was actually part of the unloading equipment. It therefore became an appurtenance of the vessel the same way as the defective block did in the Peterson case.

On the basis of the cases cited by the Court in its opinion it is obvious that all of those cases are distinguishable in that the activities of the stevedore and the equipment used by the stevedoring company became part and parcel of the vessel and the defectiveness of the equipment rendered the vessel unseaworthy. Such is not the case presently before the Court as the

baker flag was in all regards seaworthy and the only thing that was nearby were some hanging lines and it is clear from the evidence that these lines were not part or parcel of the equipment of the vessel and had no relation to the baker flag and its use.

It is therefore respectfully submitted that the Court reinstated the findings of the Trial Court so as to prevent a further unjustified extension of the doctrine of seaworthiness.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON,
By KENNETH E. ROBERTS.